

# EXHIBIT 36

**Plaintiff's Opposition to Motion for Summary Judgment**

MONTANA FIRST JUDICIAL DISTRICT

LEWIS & CLARK COUNTY

DAVID HARDY, individual, and as  
member/owner of DOCHARDY.COM, LLC,

Plaintiff,

Vs.

No. CDV-2003-285

VISION SERVICE PLAN, a California  
non-profit corporation,

Defendant.

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Deposition of

CHERYL ANN JOHNSON

Tuesday, July 27, 2004

Reported by:

SHARON CABELLO, RPR

CSR No. 3080

Job No. 44706A

1 APPEARANCES

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1     that information to the out-of-network provider?

2     A.           I don't know specifically what is provided to  
3     the out-of-network doctor, that is handled in another  
4     area.

5     Q.           Okay. Have you reviewed Dr. Hardy's file in  
6     this case?

7     A.           No.

8                 MR. RENAUD: You mean, ever, Counsel, or did  
9     you mean in preparation for the deposition?

10                MR. SEIFERT: I guess I mean ever.

11                THE WITNESS: Not that I recall.

12     Q.           MR. SEIFERT: Okay. One of the things that --  
13     one of the subjects referred to in our Interrogatory 9  
14     that we referred to at the outset of your deposition  
15     was VSP's national membership and the extent to which  
16     it includes optometrists or ophthalmologists who are  
17     also franchisees of regional or national vision  
18     services or products companies.

19                 Are you aware of whether or not there are any  
20     optometrists or ophthalmologist who are VSP's -- on  
21     VSP's panel and who are also franchisees of regional or  
22     national vision services or products companies?

23     A.           Yes.

24     Q.           Okay. Are you aware -- using that as a class  
25     of doctors or as a group of doctors, are you aware of

1 any members of that group whose membership is not being  
2 challenged by VSP?

3 A. Not being challenged in that we are aware of  
4 it, but doing nothing about it?

5 Q. Yes.

6 MR. RENAUD: Or have never done anything about  
7 it.

8 MR. SEIFERT: Well, doing nothing about it.

9 MR. RENAUD: Currently.

10 THE WITNESS: I would need you to define  
11 "nothing about it."

12 Q. MR. SEIFERT: Okay. I am aware that there are  
13 Pearle franchisees who were parties to litigation  
14 entitled Binder, et al., versus VSP, who have retained  
15 their VSP membership. Are you aware of that?

16 A. Yes.

17 Q. Other than those doctors, are you aware of any  
18 other Pearle franchisees or franchisees of any national  
19 company who are currently VSP members in good standing  
20 whose membership is not being terminated?

21 A. I would again need you to define "in good  
22 standing." I am aware of instances where we may be  
23 aware of doctors who may be affiliated with some type  
24 of franchise who are participants on our network, but  
25 may have some type of restricted membership.

1 Q. And without identifying those providers could  
2 you further describe the providers you have in mind  
3 that you were just referring to?

4 A. Describe in what way? Numbers, locations?

5 Q. Yes, both. Who are you talking about?

6 A. We have some doctors in Texas and some doctors  
7 in Michigan that would fall into that category.

8 Q. And can you tell me why they are not subject  
9 to efforts to terminate their membership?

10 A. Because VSP made a business decision to retain  
11 them.

12 Q. Okay. Why?

13 MR. RENAUD: Object to the extent it may call  
14 to attorney/client privileged information or  
15 confidential settlement information. But if you can  
16 keep those two items out of your answer, you are all  
17 set.

18 Q. MR. SEIFERT: Are you able to keep those two  
19 items out of your answer?

20 A. I can give you an example of the Texas doctors  
21 which were needed to be retained due to the severe  
22 impact that not having them would have on our member  
23 and clients in that area, disruption, basically.

24 Q. And what would that impact or disruption have  
25 been?

1 A. What do you mean?

2 Q. I am asking you what you meant. You said in  
3 order to -- I think the substance of what you said was  
4 in order to avoid an impact or disruption on VSP  
5 members in the area served by those doctors you allowed  
6 them to remain on your panel.

7 A. Right.

8 Q. So what was the impact or disruption to which  
9 you were referring?

10 A. Not having doctors available to our members.

11 Q. Okay. Is there any other geographic area  
12 other than Texas where VSP has done that, to your  
13 knowledge?

14 A. Michigan.

15 Q. And let's go back to Texas. How many doctors  
16 would you estimate we are talking about?

17 A. I would say approximately 25 to 30, but I  
18 can't be certain.

19 Q. And can you tell me or do you know with what  
20 franchising entities they are associated with -- with  
21 what entities they are associated with. Sorry, I  
22 didn't intend for it to be like that.

23 A. Today's Vision and I believe it's Texas State  
24 Optical.

25 Q. And are these doctors who are franchisees of

1 Today's Vision and/or Texas State Optical, are these  
2 doctors who do not have complete control of their  
3 practices and/or dispensaries?

4 A. Yes.

5 Q. And let's talk about the doctors you referred  
6 to in Michigan. Can you estimate for me how many  
7 doctors you were referring to there?

8 A. I don't know.

9 Q. Can you tell me which franchises they are  
10 associated with?

11 A. No.

12 Q. Can you tell me whether or not those are  
13 doctors who by virtue of their relationship with some  
14 franchising entity lack complete control of their  
15 practices and/or dispensaries?

16 A. Yes.

17 Q. The doctors to which we were just referring in  
18 Michigan who have been allowed to retain -- or who do  
19 retain their VSP membership, were those doctors  
20 admitted back in or about 1994 when VSP acquired  
21 Northeast VSP?

22 A. I believe so.

23 Q. And things that I have read in preparation for  
24 these deposition suggest that there at that time -- and  
25 by that time I am referring to 1994 -- were



1 approximately 300 so-called chain employed  
2 optometrists.

3 Recognizing that you don't know how many there  
4 are, is that roughly -- does that roughly coincide with  
5 the numbers that you thought existed?

6 A. I believed there would be fewer at this point.

7 Q. Can you estimate how many fewer?

8 A. I don't know. I would expect about 100 less.

9 Q. Okay. As far as you are aware has there  
10 been -- say, in the last five years has there ever been  
11 any undertaking or initiative by anyone at VSP to  
12 identify franchise doctors who somehow may have gotten  
13 on VSP's panel and terminate their membership?

14 A. I would say that we have improved our ability  
15 to be able to identify doctors that do not truly own  
16 and control their practices.

17 Q. And how have you done that?

18 A. We have expanded the questions that we asked  
19 on our credentialling and recredentialling application.

20 Q. And when you say expanded, are you referring  
21 to the new questions which ask specifically are you a  
22 member of a franchise?

23 A. Yes, that would be one of the questions.

24 Q. Okay. Have there been any other -- other than  
25 changing the language of the questions that accompany

1 the credentialling and recredentialling applications,  
2 has there been any other effort by VSP to go out and  
3 identify any franchise doctors on their panel?

4 A. Our recredentialling effort has had that  
5 effect because we did not always recredential our  
6 network.

7 Q. Okay. Any other efforts?

8 A. Not that I can think of.

9 Q. In the course of our conversation regarding  
10 market share and our reference to Deposition Exhibit  
11 13, we discussed at some length market share and the  
12 market share of private practice providers.

13 Does VSP actively track the market share of  
14 private practitioners in the United States?

15 A. I would say that we are aware of it.

16 Q. And how do you become aware of it?

17 A. That's not something that I do, so I can't  
18 speak to the specifics of that. But there are  
19 publications and various pieces of information that are  
20 communicated in the industry.

21 Q. Is there a department here at VSP of which you  
22 are aware that does do that?

23 A. Marketing.

24 Q. There are private practitioners, are there  
25 not, who to your knowledge carry lines of merchandise

1 or eyewear that are accompanied by restrictions on the  
2 method and manner in which they are advertised,  
3 displayed and marketed; true?

4 A. By the manufacturer?

5 Q. Right.

6 A. I am sure that there are.

7 Q. And does that result in the doctor's -- at  
8 least as far as dispensary goes, does that result in  
9 the doctor's loss of complete control over his  
10 dispensary?

11 A. No.

12 Q. Why not?

13 A. Because doctors would have the ability to  
14 carry various lines and they can also choose whether or  
15 not to carry a particular line or not.

16 Q. Okay. But if the doctor does carry a  
17 particular line and if the doctor is required by the  
18 manufacturer of that line to use a certain rack in  
19 displaying it, to carry a certain number or a minimum  
20 number of models from that line, and to advertise that  
21 line in only a certain way, does that result in a loss  
22 of control that is repugnant to Condition E?

23 A. No.

24 Q. Why not?

25 MR. RENAUD: Previously asked, I believe.

1 Same question it sounds like, just restated it.

2 Q. MR. SEIFERT: Okay. I will ask it again. Why  
3 not?

4 A. Because the doctor can choose to carry that  
5 line or not. And if they have made the choice to carry  
6 that line and wish to follow any restrictions placed on  
7 them on that line, then I would not say that that is  
8 the loss of complete control.

9 Q. Okay. Well, to analogize, a doctor in  
10 Dr. Hardy's situation makes the initial choice to  
11 accept the recommendations regarding marketing and the  
12 conduct of his business from Pearle. He could either  
13 choose to be a franchisee or not choose to be a  
14 franchisee, so isn't that analogous?

15 A. To what?

16 Q. To what you just described, to the doctor who  
17 has the initial choice of selecting a particular line  
18 of eyewear that imposes upon him restrictions in the  
19 way that it is displayed and marketed.

20 A. No.

21 Q. Why not?

22 A. Because that doctor can choose to follow the  
23 -- can choose to be a Pearle franchisee or not. The  
24 doctor has the choice.

25 Q. And thus has control over his practice, true?